THE STATE GOVERNOR.

II.

ADMINISTRATIVE POWERS.

THE power of the governor over the executive administration includes on the one hand his general control over the whole administration, and on the other hand the special authority conferred in certain particular branches of administration. His general authority is based on his control over the personnel of the administration, by means of his powers of appointment and removal; and by his power to see that the laws are executed, and more specific authority to direct and control the actions of subordinate officials. His special administrative powers include those in relation to military affairs and the external affairs of the State.

MADISON considered that the powers of appointment and removal were in their nature executive, and as such vested in the chief executive unless otherwise specifically provided in the constitution, as in the case of the advice and consent of the Senate to nominations by the President. This view has been in the main followed in the national government. But in the State constitutions there is little recognition of the governor's powers of appointment and removal; and the State courts have held that these powers are not inherently and exclusively executive functions. In order to exercise such powers they must be expressly granted in the State constitution or by statute.[9]

Power of Appointment. As already noted, the governor's power of appointment has shown a large measure of change, and has been subject to conflicting and opposing tendencies. From the time of the revolution until the middle of the nineteenth century the trend was strongly in the direction of reducing the governor's power. Since 1850, however, there has been a large counteracting tendency, especially with reference to newly established offices. But the results of the earlier movement remain largely in force; and the present situation is very confused and chaotic.

The history of this power in New York State is of especial interest. Here, under the first State Constitution, the governor had power to appoint most State and many local officers, subject to the advice and consent of a council of appointment, consisting of four members of the senate elected by the assembly. For over twenty years, the governors exercised the exclusive power of making nom-

[9] Hovey v. State (1889), 119 Ind. 395; State v. Hyde (1889), 121 Ind. 20; Fox v. McDonald (1893), 101 Ala. 51.

inations to the council; but in 1801 it was provided that any member of the council might make nominations for appointment. Under this system of diffused responsibility, appointments were considered mainly as elements of patronage, and serious evils developed, which strengthened the sentiment in favor of further decentralization.[10] Accordingly, by the constitution of 1821, the council of appointment was abolished, the principal State officers were made elective by the legislature, and most of the local officials were made elective by local districts. Judges, however, were to be appointed by the governor, subject to the consent of the senate. The constitution of 1846 decreased further the governor's appointing power by providing for the popular election of judges. Since that time, the tendency has been strongly in the opposite direction. Many new State offices have been established, which are filled for the most part by the governor and senate; while the governor has also a general power to appoint to any position for which no other method of appointment or election is provided, and also to fill vacancies, except in the older State offices.

In Illinois, the first State constitution of 1818 provided that the governor should nominate, and with the advice and consent of the senate should appoint, officers except as otherwise provided in the constitution. But as the legislature was to select the State treasurer and judges, and county sheriffs and coroners were made elective, the governor's power was but slight. By the constitution of 1848 the governor's power of appointment was further reduced by making all the constitutional State offices elective. The constitution of 1870, however, provides that the governor and senate shall appoint all officers whose appointment or election is not otherwise provided for; and since that time most of the many new State officers, boards and commissions are appointed under this provision. These appointments include the members of the railroad and warehouse commission, the State board of administration, a considerable number of other salaried officers and members of many unpaid boards and commissions.

In other States the general line of development has been along similar lines to that in New York and Illinois. The older group of State officers,—such as secretary of state, treasurer, auditor and attorney-general—are usually elected. But the governor has power,

[10] Governor DeWitt Clinton said of this system in 1821: "If the ingenuity of man had been exercised to organize the appointing power in such a way as to produce continual intrigue and commotion in the State, none could have been devised with more effect than the present arrangement." At that time there were more than 6,000 civil appointments and over 8000 military appointments filled by the council.

with the advice and consent of the State senate, to appoint to a more or less numerous list of offices, boards and commissions, and also the power to make temporary appointments to fill vacancies in elective offices. In some States, the appointive officers include some of the most important administrative posts, occasionally embracing some of the older officers.

Thus in New York, there are included the superintendents of public works, of prisons, of banking and of insurance, the members of the Lunacy Commission (which manages the twelve State hospitals for the insane) and the members of the Public Service Commissions. In Pennsylvania and New Jersey, the secretary of State and the attorney-general are still appointed by the governor and senate. In Massachusetts, Maine, and New Hampshire, the governor and council appoint all judicial officers. In Virginia and Tennessee the auditor or comptroller is so appointed; and in Louisiana and some other southern States the governor has until recently had a large power of appointment, including executive, judicial, and local offices. As a rule, the governor's appointing power does not include any important local offices; but in some States he appoints police commissioners for particular cities, such as Boston, Mass., and St. Louis, Mo.

The election of the older class of State officers, who correspond in some degree to the heads of executive departments in the national administration, makes these positions independent of the governor's control; although the custom of electing party tickets for the same term as the governor reduces the friction likely to arise between the various officials. But even over the positions filled by appointment the governor's control is far from complete. The terms of these appointive officers are often longer than that of the governor; and, as will be noted below, his power of removing such officers is usually limited.

In a number of States appointments to subordinate positions in the State administrative service is now regulated by civil service laws, requiring competitive examinations to determine the fitness of those appointed. Such laws have been passed in Massachusetts, New York, New Jersey, Wisconsin and Illinois. These laws are aimed to prevent appointments as political rewards, and to some extent limit the governor's power of patronage to minor posts. But it should be noted that they do not apply to the appointment of heads of departments or bureaus filled by election or by appointment of the governor and senate. Indeed the merit system to some extent strengthens the position of the governor, by regulating subordinate appointments under the elective State officers, through the civil service commission appointed by the governor.

The power of removal possessed by State governors is everywhere much limited, in even more marked contrast with the power of the President than is the power of appointment. In the national government, the President has an absolute power of removal over all officers in the executive department,—a power based not on any specific provision of the Constitution but on the view that this is part of the executive power. In the States, however, no such removal power is considered to be implied in the executive power; and the governor has only the power of removal distinctly provided in the State constitution or by statute.[11]

In New York, under the first State constitution, the governor and council of appointment jointly had and exercised a power of removal co-extensive with their power of appointment; but the abuse of this power for political purposes in the early years of the nineteenth century was one of the reasons for the abolition of the council of appointment in that State. Under the constitution of 1821, when the local officials became elective, the governor was given power to remove some of these officers for cause; and this power now applies to sheriffs and district attorneys in that State. The governor of New York has also power during the recess of the legislature to suspend the State treasurer for violation of duty; and by statute may remove for cause, with the consent of the State senate, appointed State officers.

Constitutional provisions in regard to the removal power show a wide variation in the different States. In all the power of impeachment is provided, at least for certain officers. In some States there is a further provision that methods of removal for certain causes shall be provided by law. In several States provision is made for the removal of some officials (usually judges and elective officers) by the governor on an address by two-thirds of each house of the State legislature.

Illinois and Nebraska provide that the governor has power to remove any officer whom he may appoint, for incompetency, neglect of duty, or malfeasance in office; and in Maryland the governor may remove for incompetency or misconduct all civil officers who receive an appointment from the executive for a term of years.

In Michigan a case of defalcation by the State treasurer, disclosed after the session of the legislature, showed the absence of any method of removal, except by a special session of the legislature; and this led to the adoption of a constitutional amendment authorizing

[11] Jersey City v. Pritchard, 36 N. J. L. 101; Field v. People, 3 Ill. 79; Nicholson v. Thompson, 5 Rob. (La.) 367.

the governor, except when the legislature was in session, to examine any public office, and to remove for gross neglect of duty or for corrupt conduct in office or for any other misfeasance in office any elective or appointive State officer, except legislative or judicial.

In Michigan and Wisconsin, as in New York, the governor may remove for cause sheriffs or district attorneys. In Illinois the governor may remove a sheriff who fails to protect a prisoner or person under arrest who is in his charge.

It thus appears that the governor's power of removal is distinctly limited, both in regard to the class of officers whom he may remove, and also by definite provisions as to the causes of removal. While proceedings for removal for cause are held to be not strictly judicial in their nature; and thus may be conferred on the governor, the question of the regularity of the proceedings is open to review by the courts. In cases brought before the courts, it has been held that removal for cause requires a definite statement of charges and an opportunity for a hearing. But the governor has full power to decide whether the evidence sustains the charges, and may assign agents to make investigations to aid in his determination.[12]

To the limited power of removal possessed by the State governor, more even than to the restrictions and limitations on his appointing power, is due the lack of an effective control by the governor over the State administration as a whole. The removal power of the President has made him the directing head of the national administration; but in the absence of this power the governor is not always able to compel inferior officials to act, and in such cases he cannot be held responsible for their share in the administration.

Administrative Control. The constitutional basis of the governor's general control over the actions of the administration are the provisions, in practically all of the State constitutions, making it his duty to "take care" [or to see] "that the laws are faithfully executed," and authorizing him to "require information in writing from the officers of the executive department on any subject relating to the duties of their respective offices." Some State constitutions provide that such information may be required under oath; some authorize the examination of books and accounts; some (Alabama, Idaho, Illinois, Texas) name the officers and managers of State institutions as well as the officers of the executive department, while in Indiana "the officers of the administrative department" are named.

[12] Dullam v. Willson (1884), 53 Mich. 392, 51 Am. Rep. 128; Attorney General v. Jochim (1894), 99 Mich. 358, 41 Am. St. Rep. 606; In re Guden, 171 N. Y. 529; State v. Hawkins (1886), 44 Ohio St. 98; People v. Denman, 16 Colo. App. 337; Lease v. Freeborn, 52 Kan. 750; Sweeney v. Coulter, 109 Ky. 295; State v. Knott, 207 Mo. 167.

In several States (Illinois, Montana, Nebraska, North Carolina and West Virginia) the officers of the executive department and the officers of all public institutions are required to submit reports to the governor before the regular session of the legislature. In Michigan the governor may investigate any public office; in Idaho and Montana, he may appoint a committee to investigate any executive office or State institution; in Georgia it is more specifically made his duty to examine quarterly or oftener the treasurer and comptroller-general and to review their books and accounts.

An analysis of these provisions serves to indicate the lack of continuous and effective control on the part of the governor in most of the States. The power to see that the laws are enforced is vague, and is not considered as giving the governor any definite means of compelling other officials to act. The power to require information seems to look towards special inquiries rather than a systematic supervision over subordinate officials. The more definite powers granted in some States apply only to the specific conditions named; and serve mainly to emphasize the lack of more general authority and the absence of even these specified powers in most of the States.

It is true, however, that "the execution of the laws embraces more than what is written in the constitutions and statutes, and includes an important class of subjects within the domain of the common law. To the executive is confided the care of the interests of the State as a body politic in various civil relations, such as an owner of property, real and personal, as a contracting party, as a creditor, as a litigant, as a party entitled to certain immunities, and as one injured, in its sovereign capacity, not merely as by public offences or crimes, but by wrongs done to its property or by frauds committed upon it in various ways, such as the wrongful procurement of grants of public lands or of corporate franchises. Other matters pertaining neither to the general criminal law on the one hand nor to the mere private rights of the State on the other, but of the nature of public rights or interests of the State or affairs involving the general welfare, as for example the public highways and waters of the State, its forests, game and fisheries and its public franchises, are entrusted to the care of the executive, to the end of checking usurpation or correcting abuses. All or most of the foregoing powers depend in general on the common law for their explanation and for the definition of the executive authority to be exercised and the mode of its action."[13]

On the other hand, "the executive power in the execution of the

[13] Finley and Sanderson: The American Executive, p. 106.

laws by civil or criminal proceedings in the courts of justice is exercised immediately through the agency of the attorney-general and the district or prosecuting attorneys or solicitors * * * The officers mentioned were formerly under the direction of the chief executive magistrate and in theory are so still; but election by the people and independent tenure of office, the imposition of statutory duties and the vesting of an independent official discretion, have had a tendency to remove these officers from immediate executive control."[14]

"As the law officers of the State represent the executive power in the execution of the laws through the procedure of the courts, so the sheriffs of the counties represent the same power in the execution of the judical process and in the preservation of public peace."[14] In ordinary affairs the relation of the governor to the sheriff is similar to his relation to the law officers. But, when local resistance to the law becomes too powerful to be overcome by the means at the disposal of the sheriff, he may invoke the special authority of the governor and the assistance of military force.

The governor's power to control the State administration by means of regulations or executive ordinances is also closely limited; and in the main is confined to such regulations as are expressly authorized by statute. In Massachusetts, New York, New Jersey, Illinois and Wisconsin, he has power (by statute) to issue civil service rules, governing admission to subordinate positions in the State service. But such powers have been conferred on the governor in few cases; and similar powers to issue regulations sometimes granted other State officers and boards are not under the control of the governor. His ordinance power is thus small compared to that of the President of the United States.

While the governor's legal authority to direct the actions of inferior officials in the execution of the laws is thus inadequate,—and his practical control over such officials is far from complete; nevertheless in the practical operation of government, the governor can and at times does exert considerable influence over other officials. Officers appointed by the governor are apt to accept his suggestions; and even the limited power of removal gives the governor some control and responsibility. As these powers, as well as the legislative and general influence of the governor increase, they tend to a corresponding increase in his authority over the administration. Moreover the governor's position is further strengthened by his more definite powers in certain matters which are next to be considered.

[14] Finley and Sanderson: The American Executive, pp. 111-112.

SPECIAL POWERS.

Military Power. Like the President of the United States, the governors have also military powers, which at times are of no little importance. These military powers have been derived from those of the colonial governor, which in turn were based on the military authority vested in the royal prerogative. The Massachusetts and New Hampshire constitutions contain detailed and explicit provisions as to the governors' military powers, in phraseology similar to that of the early colonial charters. But most of the State constitutions of the present time have much briefer clauses. The usual provisions are that the governor is commander-in-chief of the army and navy of the State and of the militia, except when they are in the service of the United States;[15] and that he has power to call out the militia to execute the laws, to suppress insurrection and to repel invasion. In a number of States there are other provisions, some limiting and some adding to the governor's authority. In Tennessee, the militia may be called out only in case of rebellion or invasion, and "only when the general assembly shall declare by law that the public safety require it." In Arkansas the governor has power to call out the militia only when the general assembly is not in session; but they may also be used "to preserve the peace in such manner as may be prescribed by law." In addition to the usually named purposes, the militia in Louisiana may be called out "for the preservation of law and order," in North Carolina "to suppress riots," in Texas to "protect the frontier from hostile incursions by Indians or other predatory bands," in Wyoming "to preserve the public peace," and in Oklahoma "to protect the public health." In several States it is provided that he shall not (Maryland and Kentucky) or need not (Alabama and Missouri) take personal command in the field unless directed by resolution of the legislature; and nowadays it is very seldom that the governor does take personal command.[16]

As the States may not without the consent of Congress maintain troops or ships of war during time of peace, and as none of the States maintain a standing army, the governor's power in ordinary times applies only to the citizen militia, which are called into active service to meet special emergencies. The organization and discipline of the militia is regulated by acts of the legislature, and also by acts of Congress; and as none of the States have established an

[15] The last clause does not appear in all of the State constitutions; but under the United States Constitution, the militia of the States when in the actual service of the United States are under the command of the President of the United States.

[16] Governor Vardaman of Mississippi, is reported personally to have commanded the militia on one occasion when called out to prevent a lynching.

office corresponding to the secretary of war in the national government, the regular administrative work is carried on under an Adjutant General, acting as the direct agent of the governor. The governor, as commander-in-chief, may establish rules for the State militia, subject to the regulations provided by Congress and the State legislature.

In former times and under frontier conditions, the militia were called into service from time to time to deal with Indian troubles; and at such times the governor's military powers were of large importance. Again in time of war, and especially during the civil war, the State governors were important agents of the national government in enrolling and organizing volunteer troops. But at the present time the principal active service of the State militia is when they are called out to suppress riotous mobs interfering with the execution of the laws, as in the case of strikes or attempts at lynching. The assistance of the militia is furnished at the request of the sheriff or mayor, when the local forces are insufficient; and the primary responsibility for securing this aid thus rests on the local officials. At the same time, a good deal depends on the promptness with which the request is answered, which in turn depends on the readiness of the militia; and on these points much depends on the energy and activity of the governor. It has been held that the governor's decision as to the existence of insurrection is final.[17]

In several States a small force of State police or "mounted rangers" has been organized for use in suppressing disorder and other violations of the law. These are found in Massachusetts, Pennsylvania, Texas, Arizona and New Mexico.

External Relations. Under the Constitution of the United States the control of foreign relations is vested in the President and Senate; and the States are distinctly prohibited from entering into any treaty, alliance or confederation, or, without the consent of Congress, from entering into any agreement or compact with another State or foreign power. These provisions prevent the State governor from exercising any such powers in regard to foreign affairs as are vested in the President of the United States. At the same time there are some questions which arise in regard to the relations of one State to another or to the United States; and in such matters the State governor has some authority over what may be called the external affairs of the State, although such powers are not distinctly recognized in the State constitutions.

As to relations with the national government, the Constitution of

[17] In re Moyer, 35 Colo. 159, 85, Pac. 190; Haley v. Cochran (1907), 31 Ky. L. Rep. 505, 102 S. W. 852.

the United States provides that on the application of the legislature or of the executive (when the legislature cannot be convened) the United States shall protect each State against domestic violence. Action has been taken on this provision on a number of occasions. During what is known as Dorr's Rebellion in Rhode Island, in 1842, the governor made application to President Tyler for protection, on the ground that the State was threatened with domestic violence. The President declined to take active measures, even after an application had been presented by the legislature, on the ground that a threatened insurrection was not a sufficient basis for aid. But precautionary steps were taken, which the Supreme Court later held constituted a recognition of the former government as against that instituted by revolutionary means. During the reconstruction period in the southern States, several applications for aid were made to Presidents Grant and Hayes, which were also denied. But in 1871 and again in 1876 President Grant acted on an application from the governor of South Carolina. During the railroad strikes of 1877, President Hayes sent United States troops on the application of the governors of West Virginia, Maryland and Pennsylvania. In 1892 President Harrison gave assistance in suppressing domestic violence on the application of the governor of Idaho.

During the railroad strikes of 1894, President Cleveland called out troops in Illinois, without any application from the State authorities, and against the protest of Governor Altgeld. But this was done on the application of United States officials as a means of enforcing the laws of the United States, and not for the purpose of interfering with the local authorities in maintaining the public peace.

At the time of the San Francisco earthquake and fire, in 1906, United States troops were employed in maintaining order, without application from the State authorities. But in this case the assistance was welcomed.

On the other hand, the United States government has called on the State governors to act as its agents in time of war and insurrection. During the Whiskey insurrection in Pennsylvania in 1792, the governors of New Jersey, Maryland and Virginia appeared at the head of their detachments of militia; and the governor of Virginia was placed in command. In the war of 1812, the governors of Ohio and Kentucky took the field and were in command of their militia.[18] During the civil war, the governors of the northern States were active in the work of enrolling the volunteer forces for the national government.

[18] Finley and Sanderson: The American Executive, pp. 161-2.

In regard to interstate relations, the State governors have an important authority imposed by the Constitution of the United States in the provision for the rendition of fugitives from justice. International extradition of fugitives from justice rests upon comity or treaty. Extradition was practiced between the colonies, and to some extent rested on agreements between the colonies. The articles of Confederation provided for the surrender of fugitives in terms almost identical with those in the Constitution. The latter document provides that "a person charged with treason, felony or other crime who shall flee from justice and be found in another State, shall on the demand of the executive authority of the State from which he fled be delivered up to be removed to the State having jurisdiction of the crime."

Interstate rendition is further regulated by Act of Congress, which provides for the form in which the demand shall be made, and makes the warrant of the governor of the State on whom the demand is made a complete authority for the arrest and extradition of the fugitive. The governor's action is not usually subject to review; but a question as to the identity of the person may be raised in *habeas corpus* proceedings, and extradition warrants have been held to be void because issued under an unconstitutional law, or where the evidence was not sufficient to justify the inference that a legal crime had been committed.[19] On the other hand, neither the State nor United States courts will issue a mandamus to enforce compliance with the demand, and there have been instances where a governor has declined to issue the necessary warrant.

The prohibition against interstate agreements or compacts without the consent of Congress is not considered to require the consent of Congress to every possible agreement, but is construed as directed against the formation of any combination tending to the increase of the political power of the States, which may encroach upon or interfere with the just supremacy of the United States. Thus business contracts and other agreements may be entered into, having an undefined field of interstate diplomacy, which tends to fall within the authority of the State executive. In many cases the governor finds it necessary to secure legislative authorization and support; but in some matters the State executive may act without an express statute, as in the institution of judicial proceedings in the name of the State, and more clearly in the defense of suits brought against the State.

In several States, the governor has important financial powers. Thus in some States he is required to prepare estimates of the

[19] People v. Curtis, 50 N. Y. 321; People v. Brady, 56 N. Y. 182.

amount of money to be raised by taxation; in some States all orders for payments from the State treasury must be signed by him; and in a number of cases (Virginia, Iowa, Kansas and Colorado) he is empowered to examine the accounts of financial officers.

Still other powers and duties are placed on the governor by the State constitutions and statutes. He is usually a member *ex-officio* of a number of administrative boards; and as such may take a direct (but not an exclusive) share in the work of such bodies. Thus in Illinois, the governor is *ex-officio* a member of the board of trustees of the State university, the State canvassing board, the commissioners of the State library, and the commissioners of the department of justice. Usually, however, the governor does not take an active part in the work of such boards.

Pardoning power. While in a few States the governor has the power of nominating judges, this does not give him any authority to control the judiciary, which is classed as independent of the executive. But in most States the governor has some power to modify or alter the effect of judicial decisions in criminal cases by means of the pardoning power. The power of pardon was part of the royal prerogative vested in the English Crown; and a delegated power of pardon was regularly granted to the colonial governors. Whether the power is to be considered as inherently and exclusively executive in character has been much discussed. The power is however granted specifically to the State governors, though subject to important limitations in many States; and a definite grant in the State constitution seems to be considered necessary to confer this authority.

The provisions in the State constitutions dealing with the pardoning power show a considerable variation in their terms, and some important differences in the power given to the governor. The briefest provision is that of the Kansas constitution: "The pardoning power shall be vested in the governor, under regulations and restrictions prescribed by law." In Illinois the provision is almost as short, and confers greater authority: "The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor." And the Tennessee provision is likewise brief: "He shall have power to grant reprieves and pardons, after conviction, except in cases of impeachment."

Most of the States, however, make further qualifications and requirements. The provisions that pardons may be granted only "after conviction" and excepting impeachment cases are found in nearly all of the State constitutions; and many of them also except cases

of treason, with a clause permitting temporary reprieves in such cases. A large number of State constitutions further provide that the governor must notify the legislature of pardons and reprieves that have been granted. Many States provide specifically for the remission of fines and forfeitures.

The section in the New York constitution of 1894 will illustrate the nature of the authority granted in many States. "The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction of treason, he shall have power to suspend the execution of the sentence, until the case shall be reported to the legislature at its next meeting, when the legislature shall either pardon or commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall annually communicate to the legislature each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve."

Similar provisions, often in almost identical language, are in the constitutions of Ohio, Kentucky, Michigan, Wisconsin, Iowa, Missouri, Nebraska, Wyoming and California. But in Kentucky a pardon for duelling may be granted only after five years from the time of the offense, and in California those twice convicted of a felony can be pardoned only on the written recommendation of a majority of the judges of the Supreme Court. In several other States the provisions are similar, except that treason is not excepted from the pardoning power, as in Virginia, West Virginia, North Carolina and Oklahoma. In Vermont murder cases are excepted as well as treason and impeachment cases. In Oregon treason cases are excepted; but impeachment cases are not. In Texas, those convicted of treason can be pardoned only with the consent of the senate.

In a considerable number of other States, the State constitutions contain further provisions for a board of pardons, whose approval of applications for pardon is in a few States only advisory, but in most of these States is necessary before a pardon can be granted. Advisory pardon boards are provided by the constitutions of South Carolina, Alabama, and Louisiana; and such boards have also been provided by statute in a number of States, where there is no constitutional provision, as in Michigan and Illinois.

The Indiana constitution of 1851 provides that the general assem-

bly may by law constitute a board of State officers whose advice and consent might be made necessary to the grant of pardons. In other States, however, the board is definitely provided by the State constitution, including certain State officers, and in some cases including certain judges. In the three New England States which retain an executive council (Massachusetts, New Hampshire and Maine) the pardoning power is vested in the governor and council. In Rhode Island the power is given to the governor and senate. In New Jersey, by the constitution of 1844, the pardoning power is granted to the governor, chancellor and six judges of the court of errors and appeals or a major part of them including the governor; while the governor may suspend or reprieve for not more than 90 days. A pardon board of State officers is provided by the State constitutions of Pennsylvania, Delaware, Florida, North and South Dakota, Montana, Idaho, Utah and Nevada. In Louisiana and South Dakota the presiding judge of the trial court is a member of the board, in North Dakota the chief justice of the supreme court, and in Nevada the supreme court. In South Dakota the governor may grant pardons for minor offenses. Frequently, too, in States where pardons can only be granted with the approval of such a board of pardons, it is provided that the governor may grant temporary reprieves.

In some States, as in Maryland and Mississippi, public notice must be given of applications for pardon.

JUDICIAL CONTROL OF THE GOVERNOR

The attitude of the judiciary towards the State governor is on the whole similar to its attitude towards the State legislature or to the President of the United States. Where a direct personal conflict is not involved, the courts will consider in collateral proceedings the constitutionality and legality of the governor's acts. But, they do not attempt to control his discretion in the discharge of his constitutional powers; and as a rule avoid any direct personal conflict, although in some States the judiciary have asserted more authority over the governor than have the United States courts in dealing with the President.

The issue has been raised most frequently in regard to the issue of a mandamus against a governor. The weight of authority seems to be strongly against the courts exercising any such direct control over the governor's actions in any case. This is the rule established in most of the North Atlantic and North Central and many of the Southern States.[20] But in a number of States (including Ohio,

[20] Hawkins v. Governor, 1 Ark. 570; Sutherland v. Governor, 29 Mich. 320; People v. Bissell, 19 Ill. 229; People v. Cullom, 100 Ill. 472; State v. Drew, 17 Fla. 67; Bon-

some of the Southern States and many of those west of the Mississippi river) mandamus has been issued against a State governor as a member of a board, or to compel the performance of a ministerial duty, such as canvassing election returns, signing patents for lands granted, drawing warrants on the Treasurer, or duties which might be devolved on other State officers.[21] But even in these States a mandamus will not be issued to compel the performance of a political act or to control the governor's discretion in the discharge of his constitutional powers.[22]

In support of the governor's freedom from direct judicial control it has been argued that it cannot be presumed that the judiciary can compel the governor to assume command of the army or navy when called into service, or that it can command him to give information to the general assembly, or to see that the laws are faithfully executed; and his duty in the case of commissions was said to be as clearly political as in the other cases.[23]

In the leading Michigan case, Judge COOLEY urged that there is no clear line of distinction between those duties of a governor which are political and those which are ministerial, and to undertake to draw one would open the door to an endless train of litigation to the disturbance of harmony between the executive and judicial depart-

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ner v. State, 7 Ga. 473; State v. Towns, 8 Ga. 360; State v. Bd. of Liquidation, 42 La. Ann. 647; State v. Ansel, 76 S. C. 395; Brown v. Ansel, 82 S. C. 141; Vicksburg & M. R. Co. v. Lowry, 61 Miss. 102; State v. Stone, 120 Mo. 428; Turnpike Co. v. Brown, 8 Baxt. (Tenn.) 490; Bates v. Taylor, 87 Tenn. 318; State v. Bd. of Inspectors, 114 Tenn. 516; State v. Houston (1910), 27 Okla. 606; Teat v. McGaughey, 85 Tex. 478; McFall v. State Bd. of Education, 101 Tex. 572; State v. Governor, 25 N. J. L. 331; People v. Morton, 156 N. Y. 516; In re Dennett, 32 Me. 508; Rice v. Draper (1911), 207 Mass. 577. In Indiana and Minnesota mandamus was issued in early cases; but these have later been overruled. Governor v. Nelson, 6 Ind. 496; Gray v. State, 72 Ind. 567; Hovey v. State, 127 Ind. 588. Chamberlain v. Sibley, 4 Minn. 309; Rice v. Austin, 19 Minn. 103; but cf. Cooke v. Iverson, 108 Minn. 388. Other cases not clearly decisive are: Mauran v. Smith, 8 R. I. 192; Hartranft's Appeal, 85 Pa. St. 433; Goff v. Wilson, 32 W. Va. 393; State v. Kirkwood, 14 Iowa 162; Woods v. Sheldon, 9 S. D. 392; Insane Asylum v. Wolfly, 3 Ariz. 132.

[21] State v. Chase, 5 Ohio St. 358; Trauger v. Nash, 66 Ohio St. 612; Magruder v. Swann, 25 Md. 173; Cotten v. Ellis, 52 N. C. 545; Tenn. & R. C. Co. v. Moore, 36 Ala. 371; Traynor v. Beckham, 116 Ky. 13; Martin v. Ingham, 38 Kan. 641; State v. Thayer, 31 Neb. 82; State v. Savage, 64 Neb. 684; Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156; State v. Adams, 19 Nev. 370; Middleton v. Low, 30 Cal. 596; Harpending v. Haight, 39 Cal. 189; Elliott v. Pardee (Cal. 1906), 80 Pac. 1087; Chumasero v. Potts, 2 Mont. 242; State v. Brooks, (Wyo.) 84 Pac. 488. There are also dicta by U. S. courts in favor of the power to mandamus a State Governor. Kentucky v. Denison, 24 How. 66; Bd. of Liquidation v. McComb, 92 U. S. 531; but cf. Huridekoper v. Hadley, 100 C. C. A. 395.

[22] Miles v. Bradford, 22 Md. 170; Householder v. Morrill, 55 Kan. 317; State v. Boyd, 36 Neb. 181; State v. Rickards, 16 Mont. 145; Berryman v. Perkins, 55 Cal. 483; Hatch v. Stoneman, 66 Cal. 632.

[23] Hawkins v. Governor (1839), 1 Ark. 590.

ments, and that it would be presumptuous for the courts to declare that a particular duty assigned to the governor was not essentially executive.[24]

In a Pennsylvania case, where an attachment against the governor (on non-compliance with a subpoena issued by a county criminal court) was set aside, the judge said: "The governor, having a proper regard for the dignity and welfare of the commonwealth, is not likely to submit himself to imprisonment, on decree of the court of quarter sessions, or permit his officers and coadjutors to be imprisoned. Were we, then, to permit the attempt to enforce the attachment, an unseemly contest must arise between the executive and the judicial departments of the government.[25]

In the recent Massachusetts case of *Rice* v. *Draper,* Judge KNOWLTON, after quoting from Judge COOLEY'S opinion in the Michigan case, said: "We think it would be an unfortunate rule of law that would require this court, at the request of a petitioner, to scrutinize the official conduct of the governor, in order to determine whether certain of his acts or omissions were in matters merely ministerial, or in the exercise of executive functions which properly pertained to his office. An order under a writ of mandamus against the governor, if he should refuse to obey it, might present the strange spectacle of a direction by the court to the executive forces of the government to coerce and punish the chief executive officer of the State, who commands and controls the military forces that are ultimately relied upon for the maintenance of law and order. It seems better to hold that for whatever he does officially, the governor shall answer only to his own conscience, to the people who elected him, and, in case of the possible commission of a high crime or misdemeanor, to a court of impeachment."[26]

There appears to be no case where an injunction has been issued against a State governor. In a few cases there are judicial opinions that the governor may be enjoined in connection with purely ministerial duties; but in other cases the courts have declined to enjoin the governor, and this rule would probably be followed at least in the States where a mandamus will not be issued.[27]

In regard to the governor's power over the sessions of the legislature, it has been held that the governor's determination as to the

[24] People ex rel. Sutherland v. Governor, 29 Mich. 320.

[25] Hartranft's Appeal (1877), 85 Pa. St. 433.

[26] Rice v. Draper (1911), 207 Mass. 577.

[27] Mott v. Pa. R. Co. (1858), 30 Pa. St. 9; Martin v. Ingham (1888), 38 Kan. 640; La. Bd. of Liquidation v. McComb, 92 U. S. 531; Western R. Co. v. De Graff, 27 Minn., 1; Frost v. Thomas, 26 Colo. 222; Bates v. Taylor, 87 Tenn. 319; State v. Houston (Okla. 1910), 113 Pac. 925.

advisability of calling an extra session is not reviewable by the judiciary; and that where the governor has power to prorogue the legislature in case of a disagreement between the houses as to the time of adjournment, he is the exclusive judge of the existence of the contingency, and his decision may not be reviewed by the courts.[28]

On the other hand there are several cases where quo warranto proceedings have been allowed against the governor.[29]

After the expiration of his term of office, the governor may be held personally liable for acts in office.[30] And, as already noted, in collateral proceedings the governor's acts may be held to be unconstitutional and void, even in cases of rendition of fugitives and appointments, where his power appears to be discretionary.[31]

All of the State constitutions provide for a possible means of control over the governor by the process of impeachment by the house of representatives and trial by the State senate, with the penalty of removal from office. But this could be used only in the most extreme cases; and there seems to be no instance of its exercise against a governor.

From this discussion of the powers of the State governor it should be clear that while his influence in matters of legislation is important and increasing, his authority and control over the State administration is far from complete. His power of appointment and removal are much more restricted than in the case of the President of the United States; and he has little effective power of direction over the administrative officials. Twenty years ago, Governor Russell of Massachusetts, in an address to the legislature pointed out: "That neither the governor nor the people through him have any adequate power over the executive departments of which he is the head, but his power is practically limited to suggestions, advice and appointments to fill vacancies."[32] More recently, Governor Hughes of New York noted that: "While the Governor represents the highest executive power in the State, there is frequently observed a popular misapprehension as to its scope. There is a wide domain of executive or administrative action over which he has no control, or slight control."[33]

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[28] 22 L. R. A. 716; People v. Hatch, 33 Ill. 9; Farrely v. Cole Co., 60 Kan. 356; People v. Rice, 65 Hun 236; In re The Legislative Adjournment, 18 R. I. 824.

[29] Attorney General v. Barstow, 4 Wis. 567; Morris v. Bulkley, 61 Conn. 287.

[30] Duncker v. Salmon, 21 Wis. 621.

[31] People v. Curtis, 51 N. .Y 321; People v. Brady, 56 N. Y. 182; Dullam v. Willson, 33 Mich. 392.

[32] Reinsch: Readings in American State Government, p. 7.

[33] Inaugural Address 1909, quoted in Beard: Readings in American Government and Politics, p. 436.

At the same time the growing importance of the governor's position should not be underestimated. Through his political powers he exercises a large influence over the welfare of the State, not only by his constitutional negative on legislatures but also by his positive influence as an exponent of public opinion. And in the field of administration both his express authority and his active influence are increasing, and it may be said should be further increased.

What may prove an important step in the further development of the influence of State governors, especially in matters of legislation, has been the recent conferences of State governors. The first conference was called by President Roosevelt in May 1908 to consider the question of the conservation of natural resources; and resulted in a general agreement in the main principles, followed by recommendations of the governors to the State legislature for the enactment of State legislation to carry out these principles.[34] Subsequent conferences, held at Washington in January 1910, and at Frankfort, Ky., and Spring Valley, N. J., in 1911, considered other questions where co-operation and uniformity of action by the different States is desirable. Arrangements have been made for further conferences from time to time; and the meetings of such a House of Governors, although extra-constitutional and extra-legal, may come to be a most important factor in the workings of our State governments.

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[34] Proceedings of a Conference of Governors, 1908.